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## **Brexit and the Future of Scottish Fisheries – Key Legal Issues in a Changing Regulatory Landscape**

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### **1. Introduction**

Brexit will overshadow the development of fisheries legislation for the next decade. The UK Government had developed no plan<sup>2</sup> in the event of a “leave” vote for June’s advisory referendum and the months since the vote have been mired in politics and process as the Government and political parties attempt to formulate a strategy both within the UK and externally. The politics is beyond the scope of this article, but the legal process is of fundamental importance and will set the parameters for any political settlement. Nothing exemplifies this better than the case of *R (ex parte Miller and another) v Secretary of State for Exiting the European Union*.<sup>3</sup> The Government had planned on using prerogative powers to trigger article 50 of the Treaty of Lisbon in order to start the process of negotiating withdrawal from the EU, but the Supreme Court ruled that the prerogative does not extend to acts that result in a change to domestic UK law and that there was no statutory authority to trigger article 50, so enabling legislation will be required.<sup>4</sup> At the same time, the Court acknowledged that arrangements for consultations between the devolved institutions and the UK institutions were of a political character and therefore the Scottish Parliament will not have a legal right to be consulted on future changes to the legal framework in the UK, let alone a veto on the UK’s withdrawal from the EU.<sup>5</sup> As we roll into the ‘Great Repeal Bill’ process, this delicate dance between the executive, the courts, Parliament and the devolved administrations is likely to be a constant.

Although a small industry,<sup>6</sup> fisheries have been iconic in the political narrative leading up to the European referendum, but as fisheries policy is currently the exclusive competence of the EU, the legal detail will have broader resonance than simply concerning the fishing sector. This article aims to reflect upon the key issues that may arise in the renegotiation of the legal and policy framework for fisheries management in the UK. It will explore the international position of fisheries law, before turning to key areas of Brexit negotiations including: the effects of devolution, how to replace the core mechanisms of the Common Fisheries Policy (CFP) and the effects on EU environmental law. One further aspect investigated is the impact of these negotiations on pledges in the SNP manifesto to reform inshore fisheries regulation in Scotland.<sup>7</sup> Whilst this latter point is an area that has to a broad extent been more sheltered from EU decision-making, it is possible that wider reform of UK fisheries law will have ramifications for the inshore sector.

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<sup>1</sup> This research has been funded by the Sustainable Inshore Fisheries Trust but does not represent its views.

<sup>2</sup> House of Commons Foreign Affairs Committee *Second Report: Equipping the Government for Brexit* (House of Commons 2016) HC 431, 9.

<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmfa/431/431.pdf>

<sup>3</sup> *R (ex parte Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>4</sup> A bill is currently making its way through Parliament; see European Union (Notification of Withdrawal) Bill, <http://www.parliament.uk/business/news/2017/january/commons-european-union-notification-of-withdrawal-bill/>

<sup>5</sup> n 3, para 150.

<sup>6</sup> 0.05% of GDP according to New Economics Foundation *The Marine Socio-Economics Project* (2014) [www.mseproject.net/data-sources/doc\\_download/122-8-fishing-and-uk-gdp](http://www.mseproject.net/data-sources/doc_download/122-8-fishing-and-uk-gdp).

<sup>7</sup> Scottish National Party *Manifesto* (2016) [http://www.snp.org/manifesto\\_plain\\_text\\_extended](http://www.snp.org/manifesto_plain_text_extended); Marine Scotland *Scottish Inshore Fisheries Strategy* (2015) outcome 1.

## 2. UK Fisheries Regulation in the Context of International Law

As a matter of international law, the UK is a coastal state with sovereignty over all issues within its 12 nautical mile territorial sea<sup>8</sup> and additional sovereign rights over all living and non-living resources within 200 nautical miles of its coastline, an area known as the Exclusive Economic Zone (EEZ).<sup>9</sup> Indeed, the UK has one of the largest EEZs in the EU. However, because of its membership of the EEC and later EU, fisheries management within this area has been a matter for the European institutions in Brussels.<sup>10</sup> Brexit will change this, with significant implications for fisheries regulation in the UK and beyond. The UK will, for the first time,<sup>11</sup> have exclusive control of fisheries within its EEZ. However, it does not follow that the UK will be free from all obligations, as international law will provide some constraint on what the UK can do with its sovereign rights. It is therefore important to understand these limits before discussing the more detailed development of post-Brexit fisheries law and policy.

The EEZ regimes grants coastal states a significant degree of control over their adjacent waters, but it also recognizes that other states have a residual interest in the resources therein. Thus, coastal states are obliged to ‘promote the objective of optimum utilization of the living resources in the [EEZ]’,<sup>12</sup> which means that they must allow foreign fishing vessels to access any resources that cannot be harvested by the coastal state’s own fishing fleet. A coastal state has some leeway in determining the size of the surplus that may be offered to foreign fishing vessels and the precise terms of access will also have to be negotiated.<sup>13</sup> Determining those conditions will be a key issue in trying to disentangle the UK from the CFP, but it means that we may see European fishing boats in UK waters, even after Brexit. At the same time, UK vessels may also wish to retain access to fishing grounds in the waters of other European countries and some sort of a *quid pro quo* could be an outcome of negotiations on this issue.<sup>14</sup>

There will also be other constraints in developing a post-Brexit fisheries regime. International law imposes a duty on all states to ensure that living resources under their jurisdiction are managed in order to prevent overexploitation.<sup>15</sup> To this end, the coastal state must adopt ‘measures that are designed to maintain or restore populations of harvested species at levels which can produce maximum sustainable yield, as qualified by relevant environmental and economic factors.’<sup>16</sup> The coastal state is also under an overarching obligation to ‘protect and preserve the marine environment.’<sup>17</sup> In particular, the coastal state must take into account key principles of international environmental law, such as the precautionary approach and the ecosystems approach – both of

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<sup>8</sup> 1982 United Nations Convention on the Law of the Sea (UNCLOS) art 2.

<sup>9</sup> Ibid art 56.

<sup>10</sup> The extent of EU competence in this regard was clarified in *Commission v United Kingdom*, Judgment of the European Court of Justice, 5 May 1981.

<sup>11</sup> The UK only acquired rights in the EEZ in 1976 after it joined the European Economic Community; see Fisheries Limits Act 1976.

<sup>12</sup> UNCLOS, art 62(1).

<sup>13</sup> See J Harrison and E Morgera, ‘Article 62’, in A Proelß (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck 2017) forthcoming.

<sup>14</sup> Such a compromise is hinted at in UK Government, *The United Kingdom’s Exit from and new partnership with the European Union* (2017) Cm 9417, para 8.16: ‘Given the heavy reliance on UK waters of the EU fishing industry and the importance of EU waters to the UK, it is in both our interests to reach a mutually beneficial deal that works for the UK and the EU’s fishing communities.’

<sup>15</sup> UNCLOS art 61(2).

<sup>16</sup> Ibid art 61(3).

<sup>17</sup> Ibid art 192.

which were previously applicable through the relevant EU Regulations<sup>18</sup> and will now continue to apply by virtue of international law.<sup>19</sup> These principles should guide future UK fisheries law and policy, although they still leave a degree of leeway as to how fisheries should be regulated and the substantive measures that are applied.

Where fish stocks cross international boundaries, which is the case for many species in UK waters, there is an obligation to cooperate in order to ensure the long-term sustainability of fish stocks.<sup>20</sup> It follows that the UK will have to continue working with neighbouring maritime states and the EU in order to achieve this objective. The UK will also have to interact with the North-East Atlantic Fisheries Commission (NEAFC), the relevant regional fisheries body with responsibility for fisheries management in areas beyond national jurisdiction, in order to ensure that any management measures applicable to straddling or highly migratory stocks are compatible with other international measures.<sup>21</sup> NEAFC is not able to adopt fisheries measures that are applicable to coastal state waters without the consent of the coastal state concerned<sup>22</sup> and current practice is that fishing allocations are agreed between coastal states before the matter is taken up by NEAFC in order to determine rules relating to the exploitation of high seas portions of fish stocks in the North-East Atlantic. However, there are proposals to amalgamate these two steps of decision-making into a single process in which all relevant states meet simultaneously to determine allocations within and beyond areas of national jurisdiction.<sup>23</sup> Such an arrangement would not affect the sovereign rights of the UK, but it would potentially alter the political dynamics of fisheries negotiations and it is difficult to predict what impact this would have for the UK outwith the EU.

The nature of these international rules means that the international legal framework still leaves a large degree of flexibility for the UK to adopt policies and regulations that are adapted to its own particular needs and requirements to a much greater extent than was possible under the CFP. As a result, the UK faces some important choices about how it chooses to structure its fisheries legislation and what goals it seeks to pursue in its negotiations with other states.

### 3. Scottish Devolution and Fisheries Competence

A further contextual question that arises for the UK is whether fisheries law and policy should be uniform across UK waters or whether there should be variance within the devolved regions. This is a question that holds particular importance for Scotland, which in practice controls 60% of UK waters and landings in Scottish ports of main species were valued £469,214 million in 2014 against landings for the rest of the UK totalling £219,712 million; this amounted to 69% of the total landings.<sup>24</sup> The Scottish National Party have thus always argued that it is perverse that Scotland does not have a

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<sup>18</sup> See eg EU Regulation No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (Basic Regulation) art 2.

<sup>19</sup> See eg the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), art 5; FAO Code of Conduct for Responsible Fisheries, art 6 <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>.

<sup>20</sup> UNCLOS arts 6 and 63; Fish Stocks Agreement art 5(1).

<sup>21</sup> Fish Stocks Agreement art 7.

<sup>22</sup> Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries arts 6(1) and 8(2).

<sup>23</sup> See NEAFC *Performance Review* (2014) 47. NEAFC established a working group on a framework for coastal state negotiations at its 34<sup>th</sup> annual meeting in November 2015.

<sup>24</sup> Marine Scotland *Scottish Sea Fisheries Statistics* (2015) 61-62

<http://www.gov.scot/Resource/0048/00484499.pdf>.

direct say in fisheries negotiations at the EU level since it is by far the largest fishing nation within the UK.

The division of fisheries competence at present is complex, involving the EU, the UK and the devolved administrations. Fisheries management to the 200 nautical mile limit is a devolved matter.<sup>25</sup> In reality many controls emanate from the EU and the powers of the Scottish Parliament and Government in relation to fisheries have been constrained by applicable EU rules.<sup>26</sup> Moreover, to avoid widely differing approaches being adopted by each of the UK's administrations, a fisheries concordat<sup>27</sup> has been agreed which establishes common practice by each administration for vessel licensing and quota distribution. This has limited the scope for the Scottish administration to adopt its own measures in relation to the Scottish fisheries zone.

An important caveat to the dominance of EU decision-making applies to inshore waters. Under the 1964 London Fisheries Convention (which predates the EU) the 6-12 nautical mile limit has shared access with some specific EU member states.<sup>28</sup> This has limited the full effects of the CFP in this zone. Within the 6 nautical mile limit, the situation is different again and the UK has exclusive access to its waters.<sup>29</sup> More importantly for present purposes, Scotland has exercised direct control of the fishery within its 0-6 nautical mile limit by virtue of the powers granted under the Sea Fisheries (Shellfish) Act 1967<sup>30</sup> and the Inshore Fisheries (Scotland) Act 1984.

This then leaves the question as to which institution should have responsibility for regulating fisheries in the EEZ in order to fill the void that will be left by exit from the CFP. Two different approaches could be taken to this question. Firstly, the Scottish Parliament could retain their current responsibility for fishing up to 200 nautical miles in the Scottish Zone, but with wider executive powers automatically falling to the Scottish Ministers and a broadening of the concordat with other UK institutions to encompass a wider suite of effective regulations. This is the position advocated by the Scottish Government, which has unequivocally stated its view that "Powers to be 'repatriated' from Brussels that are already within the current responsibilities of the Scottish Parliament, such as agriculture and fisheries, must remain fully devolved, with decisions on any UK-wide frameworks being for agreement between the UK Government and the Devolved Administrations."<sup>31</sup> Nevertheless, it remains a possibility that the UK Parliament could "retake" control over fisheries policy in the Scottish zone beyond 12 nautical miles, with certain executive functions then transferred to the Scottish Ministers. This latter model would mirror the approach taken in relation to marine spatial planning where the Scottish Parliament has adopted the framework for planning in the territorial sea adjacent to Scotland<sup>32</sup>, whereas Scottish offshore waters are subject to the UK legislation.<sup>33</sup> One argument in favour of this approach is that the UK is formally responsible for

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<sup>25</sup> Fisheries within the territorial sea fall within the legislative competence of the Scottish Parliament; Scotland Act 1998, s 29. Furthermore, other fisheries functions within the Scottish zone of the UK EEZ or in relation to Scottish fishing boats wherever they are in the world have been designated as within the competence of the Scottish Parliament; Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order, SSI 1999/1748.

<sup>26</sup> Scotland Act 1998, ss 29, 57.

<sup>27</sup> The Administrations *Management Arrangements for Fishing Opportunities and Fishing Vessel Licensing In the United Kingdom* (2016) <http://www.gov.scot/Resource/0051/00511305.pdf>

<sup>28</sup> Ibid annex 1.

<sup>29</sup> Basic Regulation art 20.

<sup>30</sup> Sea Fisheries (Shellfish) Act 1967 s 20(2) as amended by the Scotland Act 1998 (Consequential Modifications) (No.2) Order 1999/1820 Sch.2(I) para 42(9)(a).

<sup>31</sup> Scottish Government *Scotland's Place in Europe* (2016) para 9(c).

<sup>32</sup> Marine (Scotland) Act 2010.

<sup>33</sup> Marine and Coastal Access Act 2009.

ensuring compliance with international obligations that apply to the EEZ. It could be argued though that the Scotland Act already allows some control over the actions of the Scottish Parliament in this respect<sup>34</sup> and therefore such a precaution is not necessary.

Given its distinct characteristics, separate questions arise in relation to inshore fisheries. In practice the inshore and offshore fisheries can sensibly be managed separately, since the inshore fishery has more local connection and it has been managed separately to date. The preference for a tailored approach is confirmed by the Scottish Inshore Fisheries Strategy, as well as the National Marine Plan for Scotland, which emphasises the importance of moving decision-making closer to the people affected by those decisions.<sup>35</sup> All the same, the question of the extent of inshore waters may have to be addressed. Currently, the Inshore Fishing (Scotland) Act 1984 gives the Scottish Ministers the power to regulate sea fishing within ‘Scottish Inshore Waters’,<sup>36</sup> which is defined as ‘the area adjacent to the coast of Scotland and within the Scottish zone, and to the landward of a limit of six miles from the baseline from which the breadth of the territorial sea is measured, up to the mean high-water mark of ordinary spring tides.’<sup>37</sup> This spatial limitation is largely designed to ensure that inshore fisheries regulation fits with existing arrangements under the CFP and London Convention. Yet, the London Convention can be “denounced”<sup>38</sup> on two years’ notice.<sup>39</sup> The UK Government may serve this notice co-terminus with its notice under Article 50. If that is the case, the Scottish Government would need to plan for its inshore fisheries potentially to extend to 12 nautical miles. The question of how to deal with inshore fisheries will be returned to in the conclusion, once we have considered further ramifications of Brexit for fisheries policy.

#### 4. Principles and Policy Objectives underpinning Fisheries Regulation

The CFP has been the major driving force for fisheries regulation in the UK for the past four decades. The CFP has evolved over time to reflect emerging values. Currently article 2 of the Basic Regulation contains a range of compulsory policy objectives including requirements for sustainability and maintaining rural livelihoods.<sup>40</sup> Table 1 sets out the number of policy objectives relating to each key area.

**Table 1: Numbers of policies contained in Article 2**

<i>Environmental</i>	<i>Economic</i>	<i>Social</i>	<i>Employment</i>
6	6	4	2

Even though some controls<sup>41</sup> have been delegated to member states within 12 nautical miles, it is important to recognise that these basic objectives apply even to inshore waters. If the UK leaves the EU, there will be a need to restate the policy objectives that guide fisheries regulation. Some of the

<sup>34</sup> Scotland Act 1998 s 35 and s 58.

<sup>35</sup> Marine Scotland, *Scotland's National Marine Plan* (2015) 40.

<sup>36</sup> Inshore Fishing (Scotland) Act 1984, s 1(1).

<sup>37</sup> Ibid s 9(1).

<sup>38</sup> Though bizarrely this requires the UK Government giving notice to itself.

<sup>39</sup> London Fisheries Convention art 15.

<sup>40</sup> For reasons of space article 2 is not repeated in full – but it is well worth reading because it enshrines in law detailed strategic ambitions of the CFP.

<sup>41</sup> Basic Regulation art 20.

current objectives (like environmental obligations) are likely to be implicit in the common law<sup>42</sup> and international law<sup>43</sup>, but others (like the requirement for fisheries policy to contribute to a fair standard of living for those dependent on fishing) could potentially fall away, unless there is an active decision to retain them. This would give the UK and Scottish Government greater discretion in its treatment of the fishery – but at the same time may involve a subtle shift away from treating the resource as a mechanism for the delivery of social and regional policy.

These policy objectives will in turn have serious relevance for the substantive fisheries regulations and measures that are applied to UK fisheries. The importance of these regulations and subsidies can only be understood on the basis that the right to fish is exceptionally broad. The commercial industry operates fundamentally on the basis of the public right to fish,<sup>44</sup> which grants a right to all British citizens to fish for anything they desire anywhere in UK waters, unless that right is in some way curtailed. The EU and UK measures have therefore had a key role in shaping the current industry, and changing any of them will have profound consequences, even for inshore waters.

## 5. Quotas and Technical measures

Under the CFP, quotas have been decided between EU members and between the EU and adjacent coastal states.<sup>45</sup> The quota is then distributed to member states for them to distribute in any way they see fit to their fishing businesses.<sup>46</sup> Following Brexit, the UK will be responsible for setting a quota within its waters, but some form of settlement with neighbours, based on the concept of maximum sustainable yield, will still need to be established.<sup>47</sup> There may be some stocks (such as shellfish) which are location specific and whose lifecycle is wholly within a UK waters, but for many (such as mackerel and other pelagic species) the international regime will still apply.<sup>48</sup> For other technical measures, withdrawal from the CFP could give Scottish authorities a freer hand to manage the fishery at the local level as they would not be bound by complex EU rules. A practical example of this is the current ban on electric fishing.<sup>49</sup> Scotland developed a nominally illegal razor fish industry from the 1990s onwards, carried out by divers catching live razor fish using a directed electric charge under water. On the face of it, this seems a relatively environmentally benign fishery, but the only way to test it (and ensure appropriate safety measures are in place) is to lobby the Scottish Government to liaise with the UK Government to persuade the EU institutions to negotiate a derogation: a long-winded process. This has been achieved by the Dutch for use in their fleet of a controversial<sup>50</sup> highly mechanised electric beam trawl<sup>51</sup> but not so far for Scottish razor fishers.<sup>52</sup>

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<sup>42</sup> T Appleby M Everard R Palmer S Simpson *Plenty More Fish in the Sea? A working paper on the legal issues related to fishing beyond maximum sustainable yield: A UK case study. Working Paper* (2013) <http://eprints.uwe.ac.uk/22111>.

<sup>43</sup> *ibid*

<sup>44</sup> T Appleby The public 'right to fish: Is it fit for purpose?', *Journal of Water Law* (2005) 16 (6), 201-205; R Barnes 'Revisiting the Public Right to Fish in British Waters' (2011) 25(3) *International Journal of Marine and Coastal Law* 433-461.

<sup>45</sup> R R Churchill and D Owen *The EC Common Fisheries Policy* (2010) 141.

<sup>46</sup> Basic Regulation art 16(6).

<sup>47</sup> See above.

<sup>48</sup> A Oliver 'Brexit and the Fishing Industry' *Fishing News* (28 July 2016) 8-9.

<sup>49</sup> EU Regulation 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms art 31.

<sup>50</sup> M McCarthy 'Nature Studies: Pulse fisheries are "the marine equivalent of fracking"' *The Independent* (14 March 2016).

Changes to the potentially Byzantine process of legislating for EU technical measures could create a more agile management system reflective of local needs and realities – but only if capacity is built up in Scottish fisheries management to take advantage of the greater flexibility. It should also be remembered that some policies pilloried by members of the fishing industry,<sup>53</sup> such as the requirement to land all catches (also known as the discard ban) originated in the UK,<sup>54</sup> so shifting the locus of decision-making will not of itself lead to a consensus of industry friendly policies, if indeed such a thing is possible.

## 6. Equal Access, Quota Allocation and the Real Economic Link

Access to marine living resources in UK waters was a key argument underpinning the movement to leave the EU. Fishermen's leaders have been zealous of the prospects of gaining greater access to fishery resources in the UK's EEZ. The campaign group "Fishing for Leave" state that one of their four key aims is:

*"To ensure the UK regains and retains all fisheries resources and they are not squandered [sic] as negotiating capital in the extrication process – fishing was 'expendable' on accession and must not be on withdrawal."*<sup>55</sup>

These are laudable objectives but whether they are achievable remains to be seen. The historical context of fishing regulation needs a little further explanation in order to understand the challenges. The UK did not bargain away its EEZ fishing rights on entrance to the EU in 1973, since it only acquired rights *after* it joined the EEC; it first claimed a 200 nautical mile exclusive fisheries zone in 1976.<sup>56</sup> Indeed, the UK was already used to the concept of participatory arrangements and had agreed shared access (at its own instigation) between the 6–12 mile limit under the London Fisheries Convention in 1964. The UK did however agree to share access to its rights once acquired with other EEC members, rather than agree to a 50 nautical mile exclusion for British vessels as lobbied for by British fishermen at the time.<sup>57</sup> The potential 50 nautical mile exclusion dwindled to a 12 nautical mile exclusion which itself is still subject to the London Convention. The UK is therefore not in a position to 'regain' rights, but rather when it leaves the EU it is in a position to gain exclusive control of fisheries in its EEZ for the first time. This is important in terms of process, as it means that leaving the CFP will not be a simple case of reverting back to management practices established prior to UK entry to the EU, but will involve the development of something wholly new.

Outside the 6 mile limit for some EU members, and the 12 nautical mile limit for all EU members, the UK EEZ (as with that of other member states) has been managed under the principle of equal

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<sup>51</sup> EU Regulation 227/2013 of the European Parliament and of the Council of 13 March 2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption art 1.

<sup>52</sup> Scottish Government *Consultation about electrofishing for razor clams in Scotland* (2016) <https://consult.scotland.gov.uk/marine-scotland/electrofishing-for-razor-clams/>.

<sup>53</sup> Fishing for Leave, *The Results of the EU Common Fisheries* (2017) <http://ffl.org.uk/1782-2/>.

<sup>54</sup> Hugh's Fish Fight *The story* (2017) <http://www.fishfight.net/story.html>.

<sup>55</sup> n 53 <http://ffl.org.uk/objectives/>.

<sup>56</sup> See above.

<sup>57</sup> BBC *Fighting for fishing rights in Europe* (19 July 1976) [http://news.bbc.co.uk/onthisday/hi/dates/stories/july/19/newsid\\_2515000/2515155.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/july/19/newsid_2515000/2515155.stm).



access.<sup>58</sup> This is a reciprocal arrangement where the UK gives access to its waters in return for access to the waters of other member states. In practice this has been an unequal for the UK. On average, for the years from 2012 to 2014, it is estimated that more than half (58%) of the fish and shellfish landed from the UK's EEZ was caught by other EU members' fishing boats. Other EU members' boats landed 650,000 tonnes from UK waters, while UK boats landed 90,000 tonnes from theirs.<sup>59</sup>

Other areas of the CFP are, however, benign to the fishing industry. There are two significant policies which afford the UK industry protection, which is not present in most sectors of the economy and which would fall away unless replaced in domestic legislation. These are the requirement for an "economic link" for fishing businesses attracting UK quota, discussed below, and the European Marine and Fisheries Fund, discussed in the following section.

The basic principles of freedom of establishment and freedom of movement have traditionally underpinned EU law, permitting businesses from other EU member states to set up in the UK.<sup>60</sup> Yet, there is a central problem to the application of these principles in respect of fisheries. Stocks allocated to the UK are distributed by the UK Government (and devolved administrations) to British fishing vessels. In the famous *Factortame* case<sup>61</sup>, Spanish fishing interests successfully challenged the British Merchant Shipping Act 1988, *inter alia*, on the basis that it discriminated against EU member states since the definition had strict domicile and ownership requirements on owners of British fishing vessels.<sup>62</sup> The UK Government was forced to amend the Act and remove these explicit limitations, resulting in the acquisition of British fishing vessels by businesses from elsewhere in the EU. The EU did however permit licence conditions on fishing vessels which required a "real economic link." The current licence conditions set out:

*The real economic link will be deemed to have been complied with, by the demonstration by the licence holder, to the satisfaction of UK fisheries departments, of a chosen option to include specifically:*

*the landing of at least 50 per cent of the vessel's catch in the UK of stocks subject to EC quotas;*

*employing a crew, of whom at least half are resident in a UK coastal area;*

*incurring a certain level of expenditure on goods and services, provided in UK coastal areas.*

*At least 75 per cent of the crew on board the vessel at any time shall be nationals of member states of the European Community or other British citizens.*<sup>63</sup>

A 2009 report by Vivid Economics found that 9% of UK fishing quota was held by foreign owned British vessels and they were responsible for 16% of landings by weight.<sup>64</sup> It concluded that there

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<sup>58</sup> Basic Regulation art 5.

<sup>59</sup> I Napier *Fish Landings from the UK EEZ* (2016) <https://www.nafc.uhi.ac.uk/research/statistics/eez-landings/landings-uk-eez-1>.

<sup>60</sup> Treaty on the Functioning of the European Union art 49.

<sup>61</sup> *R (ex parte Factortame Limited) v Secretary of State for Transport (No.2)* [1991] 1 AC 603.

<sup>62</sup> see Churchill and Owen (n 45) 205 *et seq*.

<sup>63</sup> Marine Management Organisation *Licensing of a British Fishing Vessel* (2013) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/489874/afl1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489874/afl1.pdf).

<sup>64</sup> Vivid Economics *A Review of the Effectiveness of the Economic Link* (Department for the Environment, Food and Rural Affairs, 2009).

were additional mechanisms (particularly ending the free allocation of fishing quota to existing businesses) which could be implemented to restrict this figure. The House of Lords<sup>65</sup> also concluded that the practice of “quota hopping” could be restricted under the existing economic link framework. So while the EU is criticized for unfair quota allocation,<sup>66</sup> it should be recognised that there is still considerable discretion among the UK administrations relating to the process of quota allocation to the UK fleet.

In theory Brexit may also provide an opportunity to revisit *Factortame* and reallocate domestic quota. The case of *The UK Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*<sup>67</sup> indicates that such an approach may breach the European Convention on Human Rights unless very carefully handled, but perhaps the reason that the UK has not tightened up the economic link criteria is that the UK has generally welcomed foreign investment in all of its industries, and creating ownership restrictions in fisheries would contradict that policy.

For inshore waters in particular it is clear that the CFP is meant to protect domestic fishing businesses.<sup>68</sup> Article 5(2) of the Basic Regulation of the CFP explicitly states:

*In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised, until 31 December 2022, to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member State.*

In practice it is difficult to see how effective these measures are until they are removed. One salutary lesson is from the Scottish aquaculture industry (only recently included in the CFP) where the majority<sup>69</sup> (up to two thirds according to some commentators)<sup>70</sup> of the industry is in Norwegian ownership.

Moving away from these principles of EU law presents an opportunity for a greater allocation of the quota to the Scottish fleet, both from within the EU and potentially in negotiations with other third party states. However, as can be seen from the basis of relative stability, international negotiations on the access to “biological resources” do not necessarily result in an outcome settled by the fecundity of a member state’s waters. The UK probably has a claim on paper to significantly larger allocation of international quota, but “that depends on what importance those negotiating Brexit on the UK’s behalf will attribute to the UK industry”.<sup>71</sup>

## 6. Financial Support for Fisheries

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<sup>65</sup> European Union Committee *Brexit: Fisheries* (House of Lords, 2016) HL Paper 78, para 47-50.

<sup>66</sup> A Nelsen ‘Leaving EU could end ‘unfair’ French fishing quotas, says minister’ *The Guardian* (1 June 2016) <https://www.theguardian.com/environment/2016/jun/01/leaving-eu-could-end-unfair-french-fishing-quotas-says-minister>.

<sup>67</sup> [2013] EWHC 1959 (Admin).

<sup>68</sup> Basic Regulation recital (19).

<sup>69</sup> Marine Scotland *An assessment of the benefits to Scotland of Aquaculture* (The Scottish Government, 2014) 88.

<sup>70</sup> Atlantic Salmon Trust *Salmon Farming in Scotland: Economic Success or Ecological failure* (online) <http://www.atlanticsalmontrust.org/policies-and-research/salmon-farming-in-scotland-economic-success-or-ecological-failure.html>.

<sup>71</sup> n 48.

Another key feature of European fisheries policy is the European Marine and Fisheries Fund (EMFF), which is designed to promote “competitive, environmentally sustainable, economically viable and socially responsible fisheries and aquaculture.”<sup>72</sup> In doing so, the EMFF explicitly supports the implementation of the CFP.<sup>73</sup> It is a gigantic fund worth €243 million to the sector,<sup>74</sup> with around a half being spent in Scotland.<sup>75</sup> The figure is a likely to be a significant under-estimation of the amount, since many EMFF programmes require matched funding, and therefore direct further finance into the sector. The programme is explicitly exempted from EU rules on state aid.<sup>76</sup> The scale of the EMFF comes into greater focus when placed against the value of the entire UK fishery, around £1.1 billion.<sup>77</sup> Industry has been strangely weak in making its case for the preservation of the Fund. In his evidence to the House of Lords, Bertie Armstrong of the Scottish Fishermen’s Federation (SFF) said:

*“It is being used in “Project Euro Fear”: Oh, my God, we are all going to die if we do not get the EMFF funding. That is so much nonsense. It is almost the jam doughnut question: If there is a jam doughnut and you are offering it to me, I would very much like it, but I am not depending on it for my survival.”*<sup>78</sup>

This is not the place to conduct a full investigation of the EMFF and its predecessors, but the EMFF in many cases is particularly useful in support of the smaller inshore operators and their regulation.<sup>79</sup> If this subsidy is removed its impact is likely to be felt unevenly across the industry, and bold statements like Mr Armstrong’s should not be the final word on the effects on the individual businesses which make up the sector.

## 7. Fisheries Trade post Brexit

The uneven impact of regulation is particularly true in respect of free trade. There is no doubt that fish products make up an important part of UK overseas trade. In 2014, the UK exported £1,008m of fish by value of a total catch worth £1,560m and imported £848m of total imports of £2,736m.<sup>80</sup> If

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<sup>72</sup> EU Regulation 508/2014 of the European Parliament and of the Council of 15 May 2014 art 5(a).

<sup>73</sup> Ibid art 5(b).

<sup>74</sup> Department for the Environment Food and Rural Affairs *European Fisheries Fund to boost sustainable fishing in the UK* (2015) <https://www.gov.uk/government/news/european-fisheries-fund-to-boost-sustainable-fishing-in-uk>.

<sup>75</sup> Marine Management Organisation *European Maritime and Fisheries Fund (EMFF): UK Managing Authority (UKMA)* (2016) <https://www.gov.uk/guidance/european-maritime-and-fisheries-fund-emff-uk-managing-authority-ukma>.

<sup>76</sup> n 72 art 8.

<sup>77</sup> T Appleby Y van der Werf C Williams *The management of the UK’s public fishery: A large squatting claim?* (University of the West of England, 2016) <http://eprints.uwe.ac.uk/28855>.

<sup>78</sup> House of Lords *Revised transcript of evidence taken before the European Union Select Committee on the European Union* (2016) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-fisheries/oral/37841.html>.

<sup>79</sup> Indeed, maximising support from the fund had been a major plank of the Scottish Inshore Fisheries Strategy; Marine Scotland (n 7) outcome 6.

<sup>80</sup> House of Lords (n 65) written and oral evidence, at 38 <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf>.

the UK leaves the European single market<sup>81</sup> without securing some preferential trading arrangement, then the top five fishery exports would face tariffs under World Trade Organisations Rules of 2% (salmon) to 20% (frozen mackerel).<sup>82</sup> This comes at a time when Canada is in the process of completing its free trade deal with the EU<sup>83</sup> and could have zero tariffs on key fishery exports to the EU, many of which will compete with British exports.<sup>84</sup>

The direct impacts on the commercial fishing sector are going to be unpredictable (at least for the purposes of this paper) and very sectoral. Once again the SFF is sanguine about these risks:

*“Markets are markets, and people have things to sell that other people want. Spanish fishermen do not buy Scottish langoustines because they think “There is a perfect market here and I will use that to buy my langoustines”. They want langoustines at a sensible price. We are sure, one way or another, that that can be organised.”*<sup>85</sup>

It is interesting to note that the immediate aftermath of the vote to leave and the subsequent fall in the pound must have been a huge boost to Scottish fishery exports to the EU. This perhaps exemplifies how difficult it is to accurately forecast the market.

The UK Government has highlighted its view that there is a mutual interest in continued high levels of market access for agricultural and fisheries products.<sup>86</sup> Yet, the arrangement to negotiate tariff-free access is likely to turn out to be incredibly complex.<sup>87</sup> The EU deal with Canada (CETA) has been treated as a ‘mixed agreement’ and thus still requires agreement the European Parliament for the trade parts to provide provisionally (since they are the sole competence of the EU) and agreement from the member states’ (and some regional) Parliaments before it is fully implemented.<sup>88</sup> That has taken seven years for CETA and the timer is still running. The political imperative was not there in the same way as there will be with the UK, but the UK process will be an order of magnitude more complicated and potentially acrimonious.<sup>89</sup> Fisheries may have a politically disproportionate significance on both sides; they featured heavily in the UK media in the run up to the vote in June 2016, but also if the UK is seeking a mixed agreement with the EU the opinion Flemish Parliament

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<sup>81</sup> The Scottish Government has proposed that the UK, if it does not remain a member of the EU, should join the European Economic Area (EEA) which would preserve access to the single market; see Scottish Government *Scotland’s Place in Europe* (2016) para 99. See also para 107 proposing differential arrangements for Scotland and the rest of the UK.

<sup>82</sup> House of Lords (n 65) at 44.

<sup>83</sup> COM/2016/0470 Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part.

<sup>84</sup> C Blank ‘CETA trade deal will cause Canada’s EU seafood exports to spike’ *Seafood Source* (3 November 2016) <http://www.seafoodsource.com/news/supply-trade/ceta-trade-deal-will-cause-canada-s-eu-seafood-exports-to-spike>.

<sup>85</sup> House of Lords (n 65), written and oral evidence, 24 <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf>.

<sup>86</sup> n 14 para 8.15.

<sup>87</sup> For a discussion of the legal and policy framework for trade negotiations in the EU, see J Lasik and C Brown, ‘The EU-Korea FTA: The Legal and Policy Framework in the European Union’, in Harrison, J. (ed.) (2013) *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations*, Edinburgh University Press.

<sup>88</sup> European Commission *CETA Explained* (online) <http://ec.europa.eu/trade/policy/in-focus/ceta/>

<sup>89</sup> C Cooper ‘Brexit debate: Sound, fury and a whole lot of nothing’ *Politico* (31 January 2017) <http://www.politico.eu/article/article-50-debate-sound-and-fury-signifying-nothing-article-50-parliament-theresa-may/>.

may become important – since the Belgian fleet would lose could lose access to UK waters it has long fished.<sup>90</sup>

In the run up to the referendum the UK Government stated that the process would likely take a decade or more; the lengthy EU and member state processes involved mean that prospect remains unchanged.<sup>91</sup> It is encouraging, however, to note however that the free trade element could be settled more expeditiously than some of the other aspects of UK withdrawal.

Tariffs are not necessarily the only trade-related issue that will arise in renegotiating the relationship between the UK and the EU. The process of clearing customs with foreign states can be problematic, particularly with fresh produce. Moreover, to export UK produced food to the EU it is likely that of EU food safety law will still need to apply.<sup>92</sup> This bring with it two problems: the UK will no longer have any influence on the process of drafting EU food safety regulations and it will lose access to the European Court of Justice in the event that the EU or member states are developing food safety (or other) regulation which has the effect of being anti-competitive.<sup>93</sup> Some of the issues could be addressed through a bilateral trade deal that included rules on equivalence of public health measures<sup>94</sup> and some measures on international arbitration.<sup>95</sup> Without such agreement, UK fish exports could face considerable bureaucracy, and this could end up more problematic than mere financial tariffs.

## 8. Environmental Regulation

This paper is not the place for a full exploration of the impacts of Brexit on environmental law,<sup>96</sup> which will depend very much on the type of ongoing relationship the UK has with the EU, but it seems increasingly likely that the UK will adopt a ‘hard Brexit’ approach, which would wholly repatriate environmental law from the European institutions. It does not mean that the UK will simply be able to repeal its laws in this area, since many environmental obligations stem from international law, and in any case environmental protection has strong domestic political support in both the Westminster and Edinburgh Parliaments. However there will be significant changes to the *modus operandi* of UK environmental law.

The commercial fishing industry has long claimed exemption from certain environmental laws. The Environmental Impact Assessment Directive does not include fishing<sup>97</sup> and the Habitats Directive has

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<sup>90</sup> See for instance the impact of the Wallonia Parliament on CETA, P Magnette ‘Wallonia blocked a harmful EU trade deal – but we don’t share Trump’s dreams’ *The Guardian* (14 November 2016) <https://www.theguardian.com/commentisfree/2016/nov/14/wallonia-ceta-ttip-eu-trade-belgium>.

<sup>91</sup> HM Government *The process for withdrawing from the European Union* (2016) Cm 9216, at 8.

<sup>92</sup> See Food Standards Agency *Fish and Shellfish* (online) <https://www.food.gov.uk/business-industry/fish-shellfish>.

<sup>93</sup> See for instance *Commission v France* case C-1/00.

<sup>94</sup> See eg CETA, art 5.6 and annex 5-E; WTO Agreement on Sanitary and Phytosanitary Measures art 4.

<sup>95</sup> n 14, para 2.4.

<sup>96</sup> See for instance: R R Churchil *et al.* *The potential policy and environmental consequences for the UK of a departure from the European Union* (Institute for European Environmental Policy, March 2016) [http://www.ieep.eu/assets/2000/IEEP\\_Brexit\\_2016.pdf](http://www.ieep.eu/assets/2000/IEEP_Brexit_2016.pdf); Burns, C. *et al.*, *The EU Referendum and UK Environment: An Expert Review* (2016) [http://ukandeu.ac.uk/wp-content/uploads/2016/04/Expert-Review\\_EU-referendum-UK-environment.pdf](http://ukandeu.ac.uk/wp-content/uploads/2016/04/Expert-Review_EU-referendum-UK-environment.pdf).

<sup>97</sup> Though in includes aquaculture, EU Directive 2011/92/EU art 4(2).

not been fully applied to fishing outside the 6 mile limit.<sup>98</sup> Part of the reason is that since fishing is the exclusive competence of the EU and environmental regulation is a shared competence, member states have found it difficult to implement environmental laws on the EU institutions.<sup>99</sup> There is therefore, an opportunity to normalise the commercial fishery within the current regulatory framework.

It is possible that Brexit will have some negative effects on the legal framework for the protection of the environment. In particular, EU law offers scope for the European Commission to infract recalcitrant member states for failure to comply with environmental duties,<sup>100</sup> a rare power that will be difficult to replicate outwith the EU institutions. It is likely that citizens will still be able to bring cases against the government for failure to take into account relevant environmental considerations in their decision-making,<sup>101</sup> although access to a supranational court will no longer be available.<sup>102</sup> The loss of these important mechanisms could lead to greater politicisation of environmental regulation and a weakening of environmental standards unless the UK and Scottish institutions are sufficiently strengthened.

Nevertheless, there is evidence of a commitment to ensure that UK fisheries are managed in a responsible manner. The UK Marine Policy Statement set out a vision for ‘clean, healthy, safe, productive and biologically diverse seas’<sup>103</sup> and in Scotland, the National Marine Plan calls for, inter alia, ‘an ecosystem-based approach to the management of fishing which ensures sustainable and resilient fish stocks and avoid damage to fragile habitats’, ‘protection for vulnerable species’ and ‘improved protection of the seabed.’<sup>104</sup> Public authorities are required to have regard to this plan when issuing any approval, consent, licence or permit for an activity that may affect the relevant marine area.<sup>105</sup> One key challenge for the future is how to integrate fishing interests into the development of regional marine plans, a topic that will require careful consideration in order to achieve an appropriate balance of interests.<sup>106</sup>

Further evidence of the integration of environmental law and fisheries policy is provided by the use of powers under the Marine (Scotland) Act 2010 to regulate fishing activities within designated

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<sup>98</sup> Compare the practice of the EU fisheries management with the “revised approach” adopted for inshore fisheries management in the UK see: R. Clarke *et al.* ‘Dialectics of nature: The emergence of policy on the management of commercial fisheries in English European Marine Sites’ (2017) 78 *Marine Policy* 11–17.

<sup>99</sup> J Leijen ‘The Habitats and Birds Directives versus the Common Fisheries Policy: A Paradox’ (2011) 27(73) *Merkourios : Utrecht Journal of International and European Law* 19–45.

<sup>100</sup> See European Commission *Infringement cases* (online) [http://ec.europa.eu/environment/legal/law/press\\_en.htm](http://ec.europa.eu/environment/legal/law/press_en.htm).

<sup>101</sup> The UK is a party to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Article 9(2) of this Convention requires that parties ensure that members of the public having a sufficient interest have access to a review procedure before a court or tribunal to challenge the substantive or procedural legality of any decision affecting the environment.

<sup>102</sup> See for instance *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] Case C-127/02.

<sup>103</sup> UK Government *Marine Policy Statement* (2011) para 2.1.1.; though note that the white paper on Brexit (n 14 para 8.16) is not quite as ambitious and merely states: ‘we will want to ensure a sustainable and profitable seafood sector and deliver a cleaner, healthier and more productive marine environment.’

<sup>104</sup> Marine Scotland *Scotland’s National Marine Plan* (2015) 38.

<sup>105</sup> Marine (Scotland) Act 2010, s 15. See also s 3, which requires the Scottish Ministers and public authorities to ‘act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, enhancement of the health of that area, so far as is consistent with the proper exercise of that function.’

<sup>106</sup> See Marine Scotland *Scotland’s National Marine Plan* (2015), 39. The Scottish Government has designated 11 regions for the purposes of marine planning; The Scottish Marine Regions Order 2015 (SSI 2015/193).



Nature Conservation Marine Protected Areas.<sup>107</sup> Scottish Ministers are under an obligation to create and maintain a network of such sites in the waters under their control<sup>108</sup> and there will be pressure to make progress on these objectives resulting from the UK's commitments under the Convention on Biological Diversity<sup>109</sup> and the (OSPAR) Convention on the Protection of the Marine Environment in the North-East Atlantic<sup>110</sup> and the need to report on what action has been taken to the international institutions that are responsible for overseeing these instruments. When it comes to fulfilling these objectives, Marine Scotland has recognised that a balance must be achieved between environmental protection and the use of marine resources and it has indicated that 'the redistribution of anthropogenic impacts, such as fishing effort, that is likely to arise from proposed management will be considered', in part through consultations with stakeholders.<sup>111</sup> This highlights once again the need to embed fishing issues within broader marine planning processes and the importance of accessible and transparent decision-making procedures.<sup>112</sup>

## 9. Conclusions

Permeating the debate around Brexit has been a sense that the UK will 'regain' control of its fishery. If that were the case, the UK could simply be able to reinstate whatever management measures were in place before joining the EU and the process might be straightforward, but it is not. Given that the UK only gained control of its EEZ after it joined the EEC, it will need to develop a wholly new fisheries management structure in a context which is completely different to any fisheries management process it has undertaken to date. Developments in fisheries and environmental law mean that there are international constraints which have been integrated into the EU processes and which the UK will somehow need to replicate in its new structures. Moreover, devolution means that those structures will need to reflect local needs. There may be a UK fishery in the eyes of international law, but the concept is not particularly helpful in the context of devolution as it is currently legally constituted.

Replacing the CFP raises a number of questions about the technical measures that should be put in place to manage access to fish stocks and the control of fishing effort. It is clear that EU legislation is very unpopular with the fishing industry.<sup>113</sup> However the very nature of the public right to fish, which grants a right to all British citizens to fish in all UK waters, using whatever gear they like, means that the nature of regulation will have a direct impact on livelihoods. The centralised command and control model, with exclusive competence for the EU, has certainly been problematic; changing EU regulation requires having a voice in Brussels which has not always been possible for all fishermen. Furthermore the policies of relative stability and equal access which granted rights to other member

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<sup>107</sup> Eg The South of Arran Marine Conservation Order 2015 (SSI 2015/437); The Wester Ross Marine Conservation Order 2016 (SSI 2016/88); The Loch Sunart to the Sound of Jura Marine Conservation Order 2016 (SSI 2016/90).

<sup>108</sup> Marine and Coastal Access Act 2009, s 123; Marine (Scotland) Act 2010, s 79. See also Marine Scotland *A Strategy for Marine Nature Conservation in Scotland's Seas* (2011) 9.

<sup>109</sup> See Convention on Biological Diversity (CBD), article 8(a)-(b); CBD Decision X/2, annex, para 13, Target 11;

<sup>110</sup> OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas (as amended by OSPAR Recommendation 2010/12).

<sup>111</sup> Marine Scotland *A Strategy for Marine Nature Conservation in Scotland's Seas* (2011) 18.

<sup>112</sup> See discussion in M Pieraccini and E Cardwell, 'Towards deliberative and pragmatic co-management: a comparison between inshore fisheries authorities in England and Scotland' (2016) 25 *Environmental Politics* 729-748.

<sup>113</sup> In a poll 92% of fishermen voted to leave the EU, D McAngus *Report on initial analysis of a survey of UK fishermen ahead of the referendum on the UK's membership of the EU* (Aberdeen University, 2016).

states to fish in UK waters were almost certainly a result of the UK surrendering fishing interests in favour of other diplomatic advantages. At the same time, it is also true that the UK could have done more in the management of its quota to reduce quota hopping and ensure that the quota was distributed to UK fishermen on a more equitable basis. Moreover, some regulations (such as the need for conservation and management measures for stocks whose lifecycle straddles national boundaries) emanate from international law and so will continue to apply regardless of EU membership.

Some credence must be given to arguments put forward by industry that the imposition of tariff barriers will not be too harmful on markets. However, it is impossible to ignore the potential disruption for UK fishing businesses not just of tariff barriers, but also of other regulatory hurdles and the continued operation of EU food safety laws. It will not be possible to leave the EU without surrendering rights for the UK to influence EU regulations. In that context uncertainty is likely to stalk the sector until there is greater clarity on the direction of travel.

The process for establishing UK controls over fishing will be very complex. It is likely primary legislation will be needed, and given the requirements of international law for this sector in particular, those international laws should be firmly incorporated into the UK statutory framework. In practice, the process outlined by Mrs May of a “Great Repeal Bill”<sup>114</sup> is nothing of the sort.<sup>115</sup> A huge amount of new legislation will be required to translate EU law to UK law. Rather than repealing legislation, Westminster will, in reality, be creating a vast amount of new UK law. Legal academics have raised concerns that the Bill may require a huge delegation of power from Parliament to the Executive to make the appropriate changes.<sup>116</sup> Not enough delegated authority and Ministers will not be able to enact the measures they need – too much and huge swathes of law could be rewritten under delegated authority and effectively buried in the pile of secondary legislation parliamentarians cannot hope to scrutinise. If this is the case, there is no knowing whether it will be any better than EU law which it seeks to replace.

Alongside these challenges is the need to fit the new fisheries legal framework into the devolution settlement. Although legally straightforward, this latter point has serious political consequences. The Supreme Court held that devolved institutions did not have a veto over Brexit but the majority, nevertheless, highlighted that ‘the Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures’,<sup>117</sup> thus indicating that their judgment should not be seen as the end of the matter. Indeed, returning powers to Westminster, given the promises made to Scotland in the run up to the Scottish Independence referendum,<sup>118</sup> is likely to fuel calls for a second referendum and potentially Scottish independence. The UK and Scottish Parliaments and their civil services would become truly stretched if they had to draft legislation to deal with both incredibly complex situations at once.<sup>119</sup>

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<sup>114</sup> Conservatives *Britain after Brexit: A vision of Global Britain* (2 October 2016)

<http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of>.

<sup>115</sup> R Barnes *Brexit: Processes, Governance & the Great Repeal Bill: An Overview* (Coastal Futures Conference, 18-19 January 2017).

<sup>116</sup> M Dougan *Transcript: Professor Michael Dougan on the EU Referendum* (University of Liverpool, 2016) <https://news.liverpool.ac.uk/2016/06/22/transcript-professor-michael-dougan-eu-referendum/>.

<sup>117</sup> n 3 para 151.

<sup>118</sup> The Smith Commission *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (2014) [http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf).

<sup>119</sup> n 48



Another important question is whether these changes should affect current plans to reform inshore fisheries governance. Undoubtedly, Brexit will have implications for this sector. Removal of the CFP will affect some fundamental fisheries policies and technical measures for inshore waters, but the need for inshore reform seems to be largely driven by a requirement for better inshore governance,<sup>120</sup> as well as the need to integrate fisheries into the emerging system of marine spatial planning.<sup>121</sup> These issues are already within the competence of the Scottish Government and there is therefore a strong argument that inshore reform within 6 nautical miles should be progressed in any event, independent of Brexit negotiations. Moreover, inshore reform before Brexit also presents an opportunity to debate at an early stage some of the legal issues which will affect offshore waters if the UK gains exclusive control of its EEZ, before the politics becomes too heated. At the same time, it would be possible, in principle, to design a new inshore arrangement so that it could potentially be extended to the entire territorial sea of Scotland, should such an opportunity arise and be considered appropriate following the result of the Brexit negotiations.

The situation relating to Brexit is inevitably fluid, which makes it difficult, if not impossible, to make concrete predictions or proposals at this stage. With this in mind, this paper has sought to highlight some of the key legal issues that will arise in the context of fisheries, as well as some of the possible approaches that could be taken. Which course is ultimately set will depend upon a number of decisions that are made in the coming months and years. Some sense of the direction of travel will be discerned when (and if) Theresa May finally serves notice under article 50 of the Treaty of Lisbon. If she denounces the London Fisheries Convention at the same time, then major fisheries reform will certainly be on the agenda.

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<sup>120</sup> See eg M Pieraccini and E Cardwell (n 111).

<sup>121</sup> See Marine Scotland (n 7) outcome 3.